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Supreme Court of the United States

KENNETH PLEDGER, Individually and on Behalf of His Minor Children, DARNELL PLEDGER, ACHEL ROBINSON, KEIRA JOHNSON, IVAN PLEDGER, TORN PLEDGER and JILASEA HENRY; TRIXINE PLEDGER

Petitioners

VERSUS

PHIL GUILBEAU OFFSHORE INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this 33:905(b) action under the Longshore and Harbor Workers Compensation Act, the plaintiff, a Halliburton employee, slipped on algae while loading equipment onto a wooden deck of a supply boat owned by the defendant, Phil Guilbeau, Inc. while the vessel was offshore alongside a jack up rig. The case was dismissed on Summary Judgment since there was no violation of the second Scindia duty, (Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed 2d 1 (1981). The Fifth Circuit affirmed.

The questions presented, therefore are:

1. Was the Fifth Circuit in error in affirming the District Judge's grant of Summary Judgment by applying erroneous law contrary to this Court's decision in Scindia, Supra, and law in conflict with the Third and Ninth Circuit decisions,

2. Was the Fifth Circuit in error in not even considering or deciding the question of active involvement under the clear dictates of the second Scindia duty.

PARTIES TO PROCEEDINGS

The parties to this case are the plaintiffs, Kenneth Pledger, his wife Trixine Pledger, and their children. The only remaining respondent is Phil Guilbeau Offshore Inc., the other original defendants having been dismissed from the case. The intervenor is Pacific Employers Insurance (the insurer for Halliburton).

TABLE OF CONTENTS

Page

Question Presented i

Parties to Proceedings and Corporate Disclosure Statement..... ii

Table of Contents iii

Table of Cited Authorities iv

Table of Appendices v

Opinions Below 1

Statement of Jurisdiction 1

Reasons for Granting the Writ 2

Statement of the Case 3

Argument 4

Conclusion 8

TABLE OF CITED AUTHORITIES

Cases: *Page*

Bjaronson v. Botelbo Shipping Corp., 873 F.2d 1204 (1989).....5

Breaux v. United States, 1996 WL 626328 at *4 (E.D. La 1996).....7

Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532(1994).....5

Edmonds v. Compagnie, 443 U.S. 256, 1979 AMC 1167 (1979).....8

Lampkin v. Liberia, 823 F. 2d 1497, 1502 (11th Cir. 1987). See S. Rep. No. 92-1125 (1972).....5

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed 2d 1 (1981).....i, 2, 4, 5, 6, 7, 8

TABLE OF APPENDICES

page

Appendix A – Decision of Fifth Circuit Court of Appeal Entered May 1, 2003.....1a

Appendix B – Judgment of District Court Entered May 5, 2003.....1b

Appendix C – Order & Reasons of District Court Entered May 1, 2003 .....1c

Appendix D – Denial of Petition for Rehearing Entered March 4, 2004.....1d

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's opinion is published at 2003 WL 23 82 (E.D. La. May 01, 2003). It is attached hereto in the appendix as appendix "C". The Court of Appeals opinion is unpublished. It is attached as appendix "A". The petition for rehearing was denied by the Fifth Circuit Court of Appeals on March 4, 2004 (It is attached hereto as appendix "D").

STATEMENT OF JURISDICTION

The original claim against the defendant, Phil Guilbeau, was governed by section 33:905(b) of the Longshore and Harbor Workers Compensation Act. The United States District Court for the Eastern District of Louisiana, the Honorable Judge Eldon E. Fallon, pursuant to Title 28 U.S.C., sec. 636(c) entered a Final Judgment in this matter on May 1, 2003 when he granted Motions for Summary Judgment filed by Phil Guilbeau Offshore, Inc.

Jurisdiction of the Fifth Circuit Court of Appeals was evoked under 28 U.S.C., sec. 636(c)(3) and 28 U.S.C., sec. 1291.

The Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 1254.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal maritime law in conflict with this Honorable Court's decision in Scindia, Supra and in conflict with opinions of the Third and Ninth Circuit Court of Appeal.

STATEMENT OF THE CASE

The facts are fairly stated in the District Court and in the Court of Appeals opinions included in the appendix.

As the Fifth Circuit has stated: "Plaintiff was a member of a three-man Halliburton crew which had completed work on a well from a stationary lift boat. The crew was in the process of loading Halliburton's equipment from the lift boat to the deck of the Defendant's Supply boat. In the process of so doing, Plaintiff slipped in algae growing on the wooden deck of the supply boat, and was injured."(page 2 of Court of Appeals' opinion)

The vessel's function was to "run men and equipment" whenever and wherever Stone Energy Services, the owner of the well, required under its contract.

Guilbeau's captain Austin Darby's involvement was in physically controlling the motion, the attitude and the position of his vessel in relationship to the crane, with his engines and his rudder. As a result of the sea conditions, he was on a continuing basis adjusting the position of the vessel in relationship to the load.

Captain Darby was at the stern controls facing the deck maneuvering the TONY G in the rough

seas and directing the placement of the equipment on his back deck. The Halliburton hands were handling the taglines and signaling the crane operator at times. The Halliburton crew played no part in decisions as to where the equipment would be placed on the deck.

Additionally, as admitted by Captain Darby, it was Guilbeau's responsibility to maintain the deck of the TONY G to prevent the accumulation of algae on the wooden planks of the back deck and to remove algae from the back deck.

ARGUMENT

In Scindia, supra, the second duty in full is set forth as follows:

> ". . . the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a long shoremen or if it fails to exercise due care to avoid exposing long shoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation."

Scindia 451 US 156 at 167 (emphasis added).[1]

The present holding of the Fifth Circuit not only does not follow the dictates of this Honorable court in Scindia, supra, but the decision is in conflict with Third and Ninth Circuit opinions. See the thorough analysis in the leading case on the second Scindia duty in the Third Circuit opinion, Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532 (1994); see also Ninth Circuit Opinion in Bjaronson v. Botelbo Shipping Corp., 873 F.2d 1204 (1989).

In Davis, Supra the Court gave a thorough analysis of the second Scindia duty. In Davis, the

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[1] The quoted statement is everything the Supreme Court stated on what became known in the jurisprudence as the "second Scindia duty". The decision went into some detail on the other 2 duties which was the real basis of Scindia and why the Supreme Court granted writs. The reasoning of Scindia is obvious and fair. In the typical situation (where grants of summary judgment abound), where the vessel "turns over" the work area to the stevedore, the vessel's liability should be severely limited in fairness. If the vessel remains in control or is "actively involved" in the operation, then this is a completely different situation. There the issues are straight forward and simple: Did the vessel's retention of control or active involvement cause the injury, at least in part. The legislative history from the congressional reports explains why a vessel should be responsible for its own negligence. See discussion in Lampkin v. Liberia, 823 F. 2d 1497, 1502 (11th Cir. 1987).

plaintiff slipped on ice and grease on the deck of the defendant's vessel. The ice had formed because a member of the crew had hosed down the deck, in order to clear it of cement dust.

The Court found:

> "Alternatively, a finding of active control is supported by the testimony indicating that the crew generally remained on the affected portion of the deck during the stevedore's unloading operations and that the crew was responsible for maintaining the deck, evidence which tends to show that the crew never turned exclusive control of the area over to the stevedore but retained substantial control over the area. Here both Davis and Randolph testified that it was customary for the vessel, not the stevedore, to maintain the deck by removing the slippery conditions." (p. 541).

The District Judge and the Fifth Circuit Court of Appeals were in error in finding as a matter of law no violation of the second Scindia duty, principally because they did not apply the appropriate and complete law. As the Fifth Circuit stated: "... for the ship owner to be liable under the second Scindia duty the vessel must exercise active

control over the actual methods and operative details of the longshoreman's work. Breaux v. United States, 1996 WL 626328 at *4 (E.D. La 1996). This record reflects no evidence of such control." (page 3 of Fifth Circuit Opinion)

This is simply not the law and there is no federal appellate court case that has ever held such.

Additionally, the Fifth Circuit and the District Court failed to address the issue of the defendants' "actual involvement" in the work operation.

In Scindia, the Supreme Court stated "... the vessel may be liable if it actively involves itself in the cargo operations ..." (Scindia 45, US 156 at 167.) Neither the district court nor the Fifth Circuit's opinion anywhere discussed the active involvement duty of the vessel as applied to this case. Captain Darby was certainly actively involved in this operation in continuously controlling the motion of the vessel, while at the stern controls, and in directing the placement of the equipment on the deck.

The unfortunate fact of the Fifth Circuit's decision is that it shifts the defendant's responsibility to Halliburton and the plaintiff by finding that the Halliburton employees continued to work in the face of the algae on the deck (page 2 of Court's opinion). Even if Halliburton was 99% negligent, this does not relieve the vessel owner of

its responsibility to furnish a safe deck. See Edmonds v. Compagnie, 443 U.S. 256, 1979 AMC 1167 (1979).

Certainly, before this Court's decision in Scindia, Supra, the defendant would have been responsible for its negligence under the maritime tort doctrine. Nothing in Scindia changes the fact that the vessel is responsible for its own negligence.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A – DECISION OF FIFTH CIRCUIT COURT OF APPEAL ENTERED MAY 1, 2003

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-30514

KENNETH PLEDGER, individually and on behalf of his minor children Darnell Pledger, Rachel Robinson, Keira Johnson, Ivan Pledger, Storn Pledger and Jilasea Henry; TRIXINE PLEDGER,
Plaintiffs-Appellants,

VERSUS

PHIL GUILBEAU OFFSHORE, INC., et al,
Defendants,

PHIL GUILBEAU OFFSHORE, INC.,
Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(02-CV-1796-L)

Before DUHE', BARKSDALE and DENNIS, Circuit Judges.

PER CURIAM:[1]

Plaintiff, Kenneth Pledger, appeals the dismissal on summary judgment of his suit brought under 33 U.S.C. § 905(b) against the owner of the supply boat on which he was injured while loading cargo. The district court found no material facts in dispute and held that none of the duties imposed on shipowners by Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), were breached. Plaintiff appeals the decision only as to the second (active control) and third (duty to intervene) duties. After careful de novo review of the record and full consideration of the written and oral argument of the parties we affirm, essentially for the reasons given by the district court.

Plaintiff was a member of a three-man Halliburton crew which had completed work on a well from a stationary lift boat. The crew was in the process of loading Halliburton's equipment from the lift boat to the deck of the Defendant's supply boat. In the process of so doing, Plaintiff slipped in algae growing on the wooden deck of the supply boat, and was

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

injured. Before beginning the loading each member of the Halliburton crew was aware of the algae on parts of the deck, discussed it, and determined that it did not present a hazard to them in the loading operation. During the loading the seas were somewhat rough requiring the Captain of the supply boat to remain at the stern controls and constantly maneuver the boat to keep it in position next to the lift boat so that the Halliburton equipment could be lowered to the deck by the lift boat crane. The evidence varied as to whether the Captain directed the location at which only the largest and heaviest piece of equipment was placed, or directed the location of each piece of equipment. The district court accepted Plaintiff's version of those facts. There is no evidence that the Captain was aware of any algae on the deck during this operation, although he did know that at other times algae had appeared on the wet parts of the deck.

Plaintiff's primary contention on appeal is that the shipowner remained in active control of the vessel and the loading operation because the Captain directed the location at which each load was to be stowed and operated the vessel to keep it in position next to the lift boat. However, as the district court pointed out, determining placement of the cargo does not constitute active control. Clay

v. Daiichi Shipping, 237 F.3d 631 (5th Cir. 2000). Neither does simply maintaining the position of the ship while the stevedore and lift boat personnel perform all other duties in connection with the loading. For the shipowner to be liable under the second Scindia duty the vessel must exercise active control over the actual methods and operative details of the longshoreman's work. Breaux v. United States 1996 WL 626328 at *4 (E.D. La. 1996). This record reflects no evidence of such control.

With respect to the third Scindia duty (to intervene) the vessel owner can rely on the stevedore's expert knowledge, including the stevedore's judgment that a condition, although dangerous, is safe enough to permit work to continue. Greenwood v. Societe Francaise De, 111 F.3d 1239, 1249 (5th Cir. 1997). The vessel owner has a duty to intervene only when it has actual knowledge that the stevedore is using an unsafe practice which is creating a hazard because the stevedore intends to work in the face of the hazard and cannot be relied on to remedy it. See Pimental v. LTD Canadian Pacific Bulk, 965 F.2d 13, 15 (5th Cir. 1992). The owner's responsibility is "narrow and requires something more than mere shipowner knowledge of a dangerous condition." Singleton v. Guangzhow Ocean Shipping Co.,

79 F.3d 26, 28 (5th Cir. 1996). Plaintiff's evidence does not create an issue of the Captain's actual knowledge, but only that he should have known of the presence of the algae. As the district court also held, however, even if knowledge was established the evidence shows that the stevedore did not consider the algae dangerous, or that it created an unreasonable risk of harm to them or their operation. There is no evidence that the shipowner should have thought otherwise.

The judgment granting summary judgment in favor of the shipowner is AFFIRMED.

APPENDIX B – JUDGMENT OF DISTRICT COURT ENTERED MAY 5, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KENNETH PLEDGER, Individually and on behalf of his minor children, Darnell Pledger, Rachel Robinson, Keira Johnson, Ivan Pledger, Storn Pledger and Jilasea Henry, ET AL — CIVIL ACTION

NO. 02-1796

VERSUS

SECTION: L

PHIL GUILBEAU OFFSHORE, INC., ET AL

JUDGMENT

Considering the Court's Order & Reasons entered herein on May 1, 2003, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Phil Guilbeau Offshore, Inc., Stone Energy Corporation, and Aries Marine Corporation, and against plaintiffs, Kenneth Pledger, Individually, and on behalf of his

minor children, Darnell Pledger, Rachel Robinson, Keira Johnson, Ivan Pledger, Storn Pledger and Jilasea Henry, and Trixine Pledger, dismissing said plaintiffs' complaint with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the intervention of Pacific Employer's Insurance Company is hereby dismissed with prejudice.

Each party is to bear its own costs.

New Orleans, Louisiana, this 5th of May, 2003.

S/ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPENDIX C – ORDER AND REASONS ENTERED MAY 1, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KENNETH PLEDGER,
ET AL.

CIVIL ACTION

VERSUS

NO. 02-1796

PHIL GUILBEAU
OFFSHORE, INC.,
ET AL.

SECTION: L(1)

ORDER & REASONS

Before the Court are motions for summary judgment filed by Defendant Phil Guilbeau Offshore, Inc., Defendant Stone Energy Corporation, and Defendant Aries Marine Corporation. For the following reasons, the said motions for summary judgment are GRANTED.

I. BACKGROUND

This suit arises out of an incident on June 14, 2001 , when the Plaintiff Kenneth Pledger, allegedly slipped and fell on algae on the back deck of a utility boat, the M/V TONY G, while he was performing work in

the course and scope of his employment with Halliburton Energy Services, Inc. On the day of the accident, Plaintiff was working with a three man crew, consisting of himself, William Meehan and Harshari Powdrell, holding the positions of operator, engineer supervisor, and helper, respectively. The Halliburton crew was performing a perforating job and dumping cement, during which they would perforate holes in a well, dump cement in the well, and then set a plug in the well. Defendant Stone Energy contracted with Halliburton to perform these wireline services on a well in the Gulf of Mexico, and chartered the utility boat, the M/V TONY G, from Defendant Phil Guilbeau Offshore and a lift boat, the RAM XI, from Defendant Aries Marine.

On the day of the accident, the Halliburton crew did not expect to backload Halliburton equipment after they finished their work. However, the Stone Energy representative asked Meehan if he and his crew would backload the equipment. Meehan assessed the wind, seas, and weather conditions, and decided at that time that they could safely perform the backloading operation, a decision which was within his authority to make. At the time, the sea conditions were six to eight feet and the winds were 20 to 30 mph. The Aries lift boat carried the Halliburton crew onto the back deck of the

TONY G by a personal basket. When the crew stepped onto the back deck, Meehan noticed that the deck was slippery and held a safety meeting prior to Plaintiff's accident. The Halliburton crew talked about the deck being slippery and all decided that they could perform the backloading operation safely. Meehan and Powdrell described the algae on the deck as being a dark or green color of growth present on both sides of the deck. After a few loads were lowered and put in place, a gun rack was lowered to the TONY G as Plaintiff and Meehan prepared to reach for the tag lines. After Plaintiff had reached for and grabbed the tag line, the Plaintiff slipped and fell on algae on the deck and was briefly underneath the load before his co-worker Powdrell pulled him out from under the load. Both witnesses, Meehan and Powdrell, attributed Plaintiffs slip and fall to the algae on the deck, in addition to the Plaintiff who stated in his deposition "If the deck wouldn't have been slippery, I wouldn't have fell."

Plaintiffs (Kenneth Pledger, individually and on behalf of his children, and his wife Trixine Pledger) sued Defendants Phil Guilbeau Offshore, Inc. , owner of the M/V TONY G, Stone Energy Corporation, and Aries Marine Corporation, owner of the lift boat the RAM XI, alleging negligence under the general maritime law . Pacific Employer' s Insurance Company,

Halliburton's insurer for longshore and harbor workers' compensation claims, intervened in this suit to recover the amounts of worker's comp that it has paid and is continuing to pay to the Plaintiff for his injuries.).[1] All Defendants now seek summary judgment.

II LAW AND ANALYSIS

Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5th Cir. I 995). "[A] dispute about a

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[1] The parties seem to assume that the Plaintiff Kenneth Pledger is a covered employee under the Longshore and Harbor Workers' Compensation Act (LHWCA), even though Plaintiffs' complaint does not allege it and only alleges claims under the general maritime law. However, because the insurer paid benefits pursuant to the LHWCA, situs and status does not seem to be an issue. Therefore, the Court will not analyze whether the Plaintiff meets the requirements for protection under the LHWCA.

material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* To oppose a motion for summary judgment, the non-movant cannot rest on mere allegations or denials but must set forth specific facts showing that there is a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22 (1986).

The burden of demonstrating the existence of a genuine issue is not met by "metaphysical doubt" or "unsubstantiated assertions. " *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)). The Court must "resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contrary facts.'

Id. The Court does not, "in the absence of proof, assume that the nonmoving party could or would prove the necessary facts." *Id.* If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, no genuine issue exists for trial. *See Matsushita.* 475 U.S. at 588 Finally, "the mere existence of some factual dispute will not defeat a motion for summary judgment; Rule 56 requires that the fact dispute be genuine and material." *Willis*, 61 F.3d at 315. If the evidence leads to only

one reasonable conclusion, summary judgment is proper. *See Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Defendant Phil Guilbeau's Motion for Summary Judgment

Plaintiffs' claims against Defendant Phil Guilbeau are governed by section 905(b) of the Longshore and Harbor Workers' Compensation Act As owner of the vessel on which Plaintiff was injured, Defendant Phil Guilbeau owes three specific legal duties to independent contractors working on the vessel under 33 United States Code, section 905(b). Section 905(b) gives a longshoreman worker the right to file a third party suit against a shipowner for personal injuries sustained during the cargo operations aboard the owner's vessel as a result of the vessel's negligence. In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), the United States Supreme Court defined the vessel owner's duties under section 905 to include the following (l)a turnover duty, meaning that the vessel would be liable if the vessel owner fails to turn over a reasonably safe ship or fails to warn on turning over the ship of hidden defects of which it knew or should have known, (2) an active control duty, meaning that the vessel would be liable if the vessel owner fails to remedy hazards under the

active control of the vessel; and (3) the duty to intervene, meaning that the vessel would be liable if the vessel owner fails to intervene in the stevedore's operations when it has actual knowledge both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and therefore cannot be relied on to remedy it. In this case, Plaintiffs argue that Defendant Phil Guilbeau breached all three Scindia duties by failing to warn of the hidden dangers of algae on the deck, failing to remedy the condition of the algae which was on the backdeck in the active control of the Phil Guilbeau, and failing to intervene when the Halliburton crew continued to conduct the backloading operation despite the fact that the deck was covered with slippery algae.

After considering the facts of this case and applicable law, this Court concludes that Defendant 'Phil Guilbeau did not violate any of the *Scindia* duties in this case as a matter of law. First, with respect to the turnover duty, this duty relates to the condition of the vessel prior to or at the commencement of the stevedoring activities. This duty places two responsibilities on the vessel owner: (A) to exercise ordinary care under the circumstances to turn over the ship and its equipment and appliances in such condition that an expert and experienced stevedore can carry on cargo operations with reasonable

safety to persons and property; and (B) to warn the stevedore of latent or hidden dangers which are known to the vessel owner or should have been known to it in the exercise of reasonable care. *Howlett v Birkdale Shipping Co.*, S.A., 512 U.S. 92, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994). The responsibility of the vessel owner to warn of hidden dangers, however, is narrow, and it does not include dangers which are either open and obvious, or something that a reasonably competent stevedore should anticipate encountering. *See Id.*; *Wilfred v. M/V CAPE CORNWALL*, No. 97-0008, 1997 WL 567948, at *2 (E.D. La. Sept. 9, 1 997). Therefore, a vessel owner has not breached its duty to warn if the defect causing the injury is either open and obvious or one that a competent longshoreman should have seen. *Id.* This open and obvious defense also applies to the turnover duty to provide a safe vessel. *Clay v. Daiichi Shipping*, 74 F.Supp.2d 665, 671 (E.D. La. 1999) (*affirmed* 237 F.3d 631 (5th

Cir 2000)) (citing *Quevedo v Trans-Pacific Shipping Inc.*, 143 F.3d 1255, 1258 (9th Cir. 1998)). The courts have created a narrow exception to the open and obvious defense when the longshoreman's only options when facing an open and obvious danger are unduly impracticable or time-consuming. *Burchett v.*

Cargill, Inc., 48 F.3d 173, 179 (5th Cir. 1995).

In the present case, the Plaintiffs assert that the danger presented by the algae was not open and obvious to anyone in the Halliburton crew, who did not possess knowledge that algae is extremely dangerous in the spots where its growth is heavily built up. However, the evidence does not support this assertion. The deposition testimony of Meehan and Powdrell establish that the algae was clearly visible and obvious to them prior to the Plaintiff's slip and fall. Meehan and Powdrell described the algae as dark or green growths on the deck, different in color from the rest of the deck. In addition, the Halliburton crew was aware of the slippery condition of the deck due to the algae, evidenced by the safety meeting that the crew conducted during which they discussed whether they could safely perform the backloading operation on the slippery deck, which occurred prior to Plaintiff's slip and fall. Based on this uncontroverted evidence, the Court finds that the algae on the deck of the TONY G was an open and obvious condition and Defendant Phil Guilbeau did not breach its turnover duty. With respect to the exception to the open and obvious defense, Plaintiffs contend that it would have been unduly impractical or time consuming to clean the deck as the Halliburton crew did not

possess the equipment or supplies or know how to clean the algae. However, the evidence shows that the Halliburton crew had the option not to perform the backloading operation at that time if they felt it was unsafe and, thus, continuing to perform the backloading operation with algae on the deck was not the only option facing the crew Accordingly, the exception to the open and obvious defense is not applicable in this case. Therefore, Plaintiffs' claims against the vessel owner Phil Guilbeau under the first of the *Scindia* duties must fail as a matter of law.

Next, the second of the *Scindia* duties must be considered, which Plaintiffs rely on as the "main thrust" of their opposition, asserting that at all times, the Defendant Phil Guilbeau was in active control of the vessel and its backloading operation. Plaintiffs rely on the rule of law providing that the duty of the vessel owner that remains in active control of the vessel is not affected or changed even if the danger is open and obvious. Plaintiffs' argument that the TONY G remained in active control of the backdeck is based on the evidence that the Captain of the TONY G directed placement of the loads on the TONY G during the backloading operations and Plaintiffs' expert testimony that the custom and practice of backloading operations is that the captain or the captain's mate directs the operation. However, the law concerning the

active control duty indicates that "the vessel's role in dictating where the cargo will be stowed does not in itself justify imposing liability on the vessel owner." *Clay*, 74 F.Supp.2d at 673 (citing *Howlett,* 512 U.S. at 103, 114 S.Ct. at 2057 and *Breaux v. United States*, No. 95-2924, 1996 WL 626328, at *4 (E.D. La. Oct. 23, 1996) (finding that a prerequisite to vessel liability under the second *Scindia* duty is active control by the vessel over the actual methods and operative details of the longshoreman's work.)). In his deposition, the Captain of the TONY G asserted that he directed where the first and heaviest piece of equipment should be placed and thereafter was mainly concerned with maneuvering the vessel and keeping the boat as stationary as he could. The fact that the Captain of the TONY G may have directed placement of all of the equipment on the barge is insufficient to establish active control under the law cited above. This Court is unable to locate any proof that any of the Defendant Phil Guilbeau's agents actively controlled the backloading operations E[illegible]n if the deckhands were standing around in the area, as suggested by Plaintiffs, there is no evidence that any deckhand gave any instruction to the Halliburton crew. Accordingly, Plaintiffs' claims under the second *Scindia* duty must also fail

Finally, the Plaintiffs contend that the Defendant Phil Guilbeau violated the duty to intervene when the Captain and the crew of the M/V TONY G watched the Halliburton crew carry on the backloading operations in the face of a danger that was well known to the vessel. The Plaintiffs assert that the Defendant must be deemed to have had knowledge of the algae condition because the Captain had seen algae on the deck on previous instances, and the crew of the TONY G would have seen it when using the decks on a daily basis, considering the evidence that algae takes several days to grow According to the Plaintiffs, the Captain of the TONY G had a complete unobstructed view of the backdeck while the backloading operations were taking place with full knowledge of the algae present on his back deck and the dangers the algae presented, thereby triggering the duty to intervene when he witnessed continuance of the backloading operations.

With respect to the duty to intervene, a vessel owner may rely on the stevedore's expert knowledge, including the stevedore's judgment that a condition, although dangerous, is safe enough on the whole to permit work to continue. *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1249 (5th Cir. 1997). Nevertheless, the vessel owner has a duty to intervene when it has actual knowledge that the stevedore's

longshore workers are using defective equipment or engaging in an unsafe work practice which is creating a hazard and that the stevedore in the exercise of obviously improvident judgment intends to work on in the face of it and, therefore, cannot be relied on to remedy it. See *Pimental v. LTD Canadian Pacific Bul*, 965 F.2d 13, 15 (5th Cir. 1 992). In short, before the duty to intervene is triggered, the vessel owner must (1) have actual knowledge of the hazard and (2) have reason to believe that the stevedore improvidently intends to continue work in the face of it. *See Greenwood*, 111 F.3d at 1248. The Fifth Circuit has held that the shipowner's responsibility under the third *Scindia* duty is "narrow and requires something more than mere shipowner knowledge of a dangerous condition." *Singleton v Guangzhou Ocean Shipping Co* , 79 F.3d 26, 28 (5th Cir 1996). In order for a stevedore's judgment to appear obviously improvident, that expert stevedore must use an object with a defective condition or follow a procedure that is so hazardous that anyone can tell that its continued use creates an unreasonable risk of harm even when the stevedore's expertise is taken into account. *See Greenwood*, 111 F.3d at 1249.

In the present case, the Plaintiffs have not proved that the Defendant had actual knowledge of the algae on the back deck.

Rather, the Plaintiffs assert that the Defendant should have known because the Captain had seen algae on the deck in the past, algae takes several days to grow, and because the crew used the deck on a daily basis. However, no where in the Captain's deposition did he admit to knowing that at the time of Plaintiff's accident, he saw or knew that algae was on the deck during the backloading operations. However, even if knowledge were established, the Halliburton crew was not continuing the backloading operations when it was clear and undisputed that continued acts created an unreasonable risk of harm-in fact, in this case the three Halliburton crew members did not consider the slippery deck to create an unreasonable risk of harm because they specifically considered the danger and risk and decided that they could continue the backloadrng operation safely. Under the facts of this case, the Defendant had no duty to intervene.

In conclusion, the Court finds that the Defendant Phil Guilbeau did not breach its turnover duty because the evidence demonstrates that the injury causing condition was open and obvious. Further, the Plaintiffs have not presented sufficient evidence such that a reasonable jury could find that the Defendant breached the second or third *Scindia* duties. Accordingly, the Defendant Phil Guilbeau's motion for summary

judgment is GRANTED and the Plaintiffs' claims against Defendant Phil Guilbeau are dismissed with prejudice.

Stone Energy Corporation's Motion for Summary Judgment:

Defendant Stone Energy Corporation filed a motion for summary judgment arguing that it is entitled to judgment as a matter of law under the general maritime law Plaintiffs' claims against Defendant Stone Energy are based on allegations that Stone Energy was negligent in (1) ordering the backloading of the Halliburton equipment in rough seas and under circumstances that were hazardous; (2) failing to provide any riggers or crew members of the lift boat to handle the backloadmg ofRalliburton's equipment onto the M/V TONY G; and (3) failing to wait until the seas were calmer before ordering the backloading of Halliburton's equipment. Plaintiffs also alleged that Stone Energy ordered the backloading of the equipment as a money saving matter because the equipment was being rented on an hourly basis and an early removal would amount to a substantial savings to Stone Energy. Defendant Stone Energy contends that it owed no duty to Plaintiff and even if it did, Stone Energy did not breach a duty.

"The analysis of a maritime tort is guided by general principles of negligence

law." *Consolidated Aluminum Corp., v. C.F. Bean Corp., et al,* 833 F.2d 65, 67 (5th Cir. 1988). To establish a cause of action based on negligence, the Plaintiff must establish the following elements: (1) the Defendant was under a duty to the Plaintiff to use due care; (2) the Defendant breached that duty; (3) the Plaintiff suffered damages; and (4) the breach of the duty proximately caused Plaintiffs damages. *Lloyd Leasing Limited v. Conoco,* 868 F.2d 1447, 1449 (5th Cir. 1989). Determination of the tortfeasor's duty is a function of the Court. *Consolidated Aluminum*, 833 F.2d at 67. "The determination of whether a party owes a duty to another depends on a variety of factors, 'most notably the foreseeability of the harm suffered by the complaining party.'" *Steel Coils, Inc. v. M.V, LAKE MARION,* 2002 A.M.C. 1680 (E.D. La 2002) (quoting *Consolidated Aluminum*, 833 F.2d at 67). A harm is a foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay o fnatural forces and likely human intervention. *Consolidated Aluminum*, 833 F.2d at 67. To be found liable, the Defendant must have knowledge of a danger, not merely possible but probable. *Id.*; *Lloyds Leasing Limited*, 868 F.2d at 1449.

Defendant Stone Energy contends that the undisputed facts show that Stone was never informed of, and had no knowledge of the slippery deck on the M/V TONY G, nor did the Halliburton crew ever notify Stone that the seas were too rough to conduct the backloading operation. In light of these facts, Stone Energy argues that it could not foresee any danger that would result in injury to the Plaintiff and, therefore, it owed no duty to the Plaintiff. On the other hand, the Plaintiffs submit that under the prevailing weather conditions, consisting of winds 20 to 30 mph winds and seas of six to eight feet, the Stone representative should not have ordered or requested the backloading operations to take place. Plaintiffs also cite deposition testimony suggesting that the Halliburton crew was obligated to follow the orders of the Stone representative.

The Plaintiffs have failed to produce any evidence that Defendant Stone knew or could foresee the harm suffered by the Plaintiff, that is, that he would slip and fall on algae on the deck of the TONY G. The Stone representative was not present on the deck of the TONY G; instead, he was on the Aries RAM XI at the time of the backloading operations. Furthermore, as stated earlier in this opinion, both witnesses, Meehan and Powdrell, attributed Plaintiff's slip and fall to the algae on the deck, in addition to the

Plaintiff who stated in his deposition "If the deck wouldn't have been slippery, I wouldn't have fell." There is no evidence that the weather or sea conditions contributed or caused the Plaintiff's accident, rather, when asked what caused Pledger to fall, both witnesses pointed to the algae and not the weather or sea conditions. Because there is no evidence that Defendant Stone could foresee Pledger slipping on algae during the backloading operations, Defendant Stone Energy cannot be liable to Plaintiffs for negligence as a matter of law. Accordingly, Defendant Stone Energy's motion for summary judgment is GRANTED and Plaintiffs' claims against Stone are dismissed with prejudice.

Defendant Aries Marine Corporation Motion for Summary Judgment:

Defendant Aries Marine Corporation, owner of the lift boat the RAM XI, filed a motion for summary judgment arguing that the evidence does not support Plaintiffs' claims and that it did not have a duty to intervene under *Scindia*. Plaintiffs claims against Defendant Aries Marine are based on allegations that it provided an inexperienced crane operator who lowered the gun rack in a negligent manner, that the RAM XI crane was not adequate because it lowered the load too slowly, and that the Aries crew improperly

rigged the gun rack to the crane. Defendant Aries Marine simply claims that none of these allegations are supported by evidence or testimony in this case. Defendant points to the deposition testimony of Meehan and Powdiell that the cause of the Plaintiff's fall was the algae. Furthermore, Defendant Aries Marine argues that it did not have a duty to intervene under *Scindia* because it did not have actual knowledge of both the dangerous condition, the algae, or that Halliburton was not acting reasonably to protect its employees from that danger.

In response, Plaintiffs contend that fact questions exist regarding the negligence of the Captain of the RAM X in this case, which precludes summary judgment. Plaintiffs cite to deposition testimony of the Captain, in which he admitted that in general, conducting backloading operations during rough weather and sea conditions would be dangerous and could result in foreseeable injuries to the workers. The Captain also stated that he considered it his duty to assess the weather conditions and determine if backloading operations could be done safely. The Plaintiffs also refer to deposition testimony of Meehan and Powdrell describing the slowness of the crane used during the backloading operations, resulting in the equipment not coming down quickly enough to keep from

bouncing, in addition to the rough seas and wind, which caused the vessel to rock.

The duties of a vessel owner under *Scindia* are detailed above and need not be repeated here. The only duty potentially applicable to Defendant Aries Marine is the duty to intervene, as the first two duties clearly do not apply op the facts of this case as to Defendant Aries Marine. As explained above, before the duty to intervene is triggered, the vessel owner must (1) have actual knowledge of the hazard and (2) have reason to believe that the stevedore improvidently intends to continue work in the face of it. *See Greenwood*, 111 F.3d at 1248. In this case, there is no evidence that the Defendant Aries Marine had actual knowledge that the deck of the TONY G had algae on it or that the Halliburton crew was improvidently continuing to work in the face of a known danger. The only evidence is that the crane operator knew that in general, rough weather conditions and seas would produce dangerous conditions to conduct a backloading operation. The Captain did not state that on the day of the accident, the weather conditions and seas were so rough as to create a dangerous or unreasonable risk of harm to the workers during the backloading operation. In fact, there again is no evidence that links the weather and sea conditions to the cause of Plaintiff's slip and fall.

Furthermore, both Meehan and Powdrell explained that there was nothing about the way the crane lowered the load that was odd or caused Plaintiff's slip and fall. Rather, as stated earlier, both men attributed the slip and fall to the algae, as did the Plaintiff himself. Therefore, Plaintiffs have failed to provide sufficient evidence to prove that the Defendant Aries Marine was negligent. Accordingly, Defendant Aries Marine Corporation's motion for summary judgment is GRANTED and Plaintiffs' claims against Aries Marine are dismissed with prejudice.

II. CONCLUSION

For the foregoing reasons, the motions for summary judgment filed by Phil Guilbeau Offshore, Inc., Stone Energy Corporation, and Aries Marine Corporation are Granted. Accordingly, Plaintiffs' claims against all Defendants are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana
this 30 day of April, 2003.

S/ ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPENDIX D – DENIAL OF PETITION FOR REHEARING ENTERED MARCH 4, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30514

KENNETH PLEDGER, individually and on behalf of his minor children Darnell Pledger, Rachel Robinson, Keira Johnson, Ivan Pledger, Storn Pledper and Jilasea Henry; TRIXINE PLEDGER

Plaintiffs – Appellants

V.

PHIL GUTIJBEAU OFPSHORE INC, ET AL
Defendants

PHIL GUILBEAU OFFSHORE INC
Defendant – Appellee

Appeal from the United States District Court
or the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before DUHE', BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:
S/JOHN M. DUHE, JR.
United States Circuit Judge

REHG-2 -

No. 03-1554

Supreme Court, U.S.
FILED
JUN 16 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KENNETH PLEDGER, individually and on behalf of his minor children, Darnell Pledger, Rachel Robinson, Deira Johnson, Ivan Pledger, Storm Pledger, and Jilasea Henry, and TRIXINE PLEDGER,

Petitioners,

v.

PHIL GUILBEAU OFFSHORE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeal's *per curiam* decision properly applied the law as set forth in the case of *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981).

STATEMENT PURSUANT TO RULE 29.6

Respondent, Phil Guilbeau Offshore, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR DENYING THE PETITION	4
I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS	4
A. The *Davis* Case In The Third Circuit	4
B. The *Bjaranson* Case In The Ninth Circuit	5
II. PETITIONERS' MISSTATEMENTS	6
A. Misstatements Of Law	6
B. Misstatements Of Fact	7
CONCLUSION	9

TABLE OF CITED AUTHORITIES

Page

CASES

Bjaranson v. Botelho Shipping Corporation, Manila, 873 F.2d 1204 (9th Cir. 1989) 3, 5, 6, 9

Breaux v. United States, 1996 WL 626328 (E.D. La. 1996) 7

Clay v. Daiichi Shipping, 237 F.3d 631 (5th Cir. 2000) 7

Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532 (3d Cir. 1994) 3, 4, 5, 9

Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994) 7

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981) ..... *passim*

STATEMENT OF THE CASE

On June 14, 2001, Halliburton Energy Services, Inc. employed a three man crew made up of petitioner Kenneth Pledger, William Meehan, and Harshari Powdrell ("Halliburton crew"). *Ct. R. at 000066 and 000075.* Their job was to service and maintain various offshore oil and gas installations in the Gulf of Mexico. After completing their work on June 14, 2001, these men took showers and packed for their ride back to Cameron, Louisiana aboard the M/V TONY G, a utility vessel owned by respondent Phil Guilbeau Offshore, Inc. *Ct. R. at 000069-70 and 000079-80.*

On this particular job, Halliburton worked for Stone Energy Corporation ("Stone Energy"). *Ct. R. at 000078.* As they prepared to board the utility boat for the ride to shore, the Stone Energy representative ("company man") asked William Meehan if the Halliburton crew would backload Halliburton's equipment from the liftboat RAM IX to the cargo deck of the M/V TONY G. *Ct. R. at 000080.* Mr. Meehan, who was the Halliburton crew's foreman, assessed the wind, seas, and weather conditions, and decided at that time that his crew could safely perform the backloading operation. *Ct. R. at 000080-81.* Mr. Meehan had the authority to refuse to perform cargo operations when he felt those operations could not be conducted safely. *Ct. R. at 000081.*

The Halliburton crew was transferred from the RAM XI to the M/V TONY G's back deck in a personnel basket. *Ct. R. at 000068, 000076, and 000088.* Once on the back deck of the M/V TONY G, Mr. Meehan noticed that the back deck was slippery. *Ct. R. at 000077.* Mr. Meehan held a safety meeting with Pledger and Powdrell to discuss the slippery condition of the M/V TONY G's back deck. *Ct. R. at 000077, 000081, and 000089-90.* After discussing the wind, seas, and the M/V TONY

G's slippery back deck, Mr. Meehan testified, "We decided that we could do it safely and went ahead with that job." *Ct. R. at 000077.*

The three men who made up the Halliburton crew were the only individuals involved in the backloading operation. *Ct. R. at 000267.* The crew of the M/V TONY G was not involved in the backloading operation at all. *Ct. R. at 000267.* During the backloading operation, the Halliburton equipment was being hoisted by a crane located on the RAM XI. The crane was being operated by an Aries Marine Corporation employee, Larry Hebert. *Ct. R. at 000237-38.* Mr. Meehan was communicating with Mr. Hebert from his position on the back deck of the M/V TONY G, providing signals to show where the Halliburton equipment should be placed. *Ct. R. at 000305.*

Captain Austin Darby was the master of the M/V TONY G on June 14, 2001. *Ct. R. at 000094-95.* Captain Darby testified that the Halliburton crew was controlling the backloading operation that occurred on June 14, 2001. *Ct. R. at 000097.* Captain Darby had turned over the back deck of the M/V TONY G to the Halliburton crew. *Ct. R. at 000098.* While Captain Darby did direct the placement of the first and heaviest piece of equipment loaded, the skid unit with the wireline (*Ct. R. at 000097*), that was done only to ensure that weight was evenly distributed on the cargo deck of his vessel. After the placement of the skid unit with the wireline, Captain Darby's only participation in the backloading operation was maneuvering the M/V TONY G (*Ct. R. at 000098*), in order to keep the M/V TONY G as stationary as possible (*Ct. R. at 000096*).

After the placement of approximately six to eight pieces of the Halliburton equipment onto the back deck of the M/V TONY G, Pledger slipped and fell. Mr. Pledger fell while holding onto a "tag line". A tag line is a length of rope attached to the piece of equipment, and it is used to help guide and control the piece of equipment as it descends.

SUMMARY OF THE ARGUMENT

The Fifth Circuit properly applied this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). There is no conflict between and/or among the Fifth Circuit's decision in this case and the Third and Ninth Circuit's decisions in *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532 (3d Cir. 1994), and *Bjaranson v. Botelho Shipping Corporation, Manila*, 873 F.2d 1204 (9th Cir. 1989). *Davis* and *Bjaranson* simply involve different factual scenarios than that presented by the uncontroverted record in this case.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between The Circuits

A. The *Davis* Case In The Third Circuit

In the *Davis* case, the Third Circuit reversed the district court's granting of the defendant's motion for summary judgment, finding error based upon the defendant's breach of its active control duties. *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532, 549 (3d Cir. 1994). The court found that one of the vessel's crew members hosed down the deck of the vessel, creating a non-obvious hazard which proximately caused the plaintiff's injury. *Id.* at 539. The plaintiff in *Davis* testified that he did not see the spot where he fell, and that the slippery nature of the spot was not obvious. *Id.* at 540. The Third Circuit believed that this evidence was sufficient to support a jury verdict under *Scindia*. *Id.*

It is important to note that in *Davis*, the vessel crew member hosed down the deck of the vessel ***after*** the stevedore-plaintiff had boarded the vessel and began operating the siwertell (a rail-mounted mobile unit specially designed for the cement industry), but before the stevedore-plaintiff departed the vessel. *Id.* The vessel crew member performed an activity within the confines of the stevedore's area of operations. By contrast, in this case, the crew of the M/V TONY G performed no activities within the confines of the back deck. The uncontroverted evidence is that Captain Darby only directed the placement of the first piece of equipment loaded by the Halliburton crew onto the back deck of the M/V TONY G. *Ct. R. at 000097.* After this first piece of equipment was set down on the back deck of the M/V

TONY G, Captain Darby's only concern was keeping the back deck of the M/V TONY G in a relatively stationary position. *Ct. R. at 000096 and 000098.* It is uncontroverted that the crew of the M/V TONY G was not involved in the backloading operation at all. *Ct. R. at 000267.*

These uncontroverted facts distinguish this case from *Davis*. Here, there is no evidence of active involvement by the vessel crew in the stevedoring operation during which Mr. Pledger was injured. The courts below did not err in holding that the active control duty was not violated in this case.

B. The *Bjaranson* Case In The Ninth Circuit

In *Bjaranson*, the Ninth Circuit reversed the district court's judgment in favor of the plaintiff. *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204, 1209 (9th Cir. 1989). In *Bjaranson*, the court made a distinction between the active involvement duty and the active control duty. *Id.* at 1207. Neither party disputed the inapplicability of the active involvement duty. *Id.* at 1209. In the case at bar, the petitioners assert that "the Fifth Circuit and the District Court failed to address the issue of the defendants' 'actual (*sic*) involvement' in the work operation." *Petition for a Writ of Certiorari*, p. 7. Respondents believe that the petitioners meant to write "active" in place of "actual".

There is no conflict between the Fifth Circuit's decision in this case and the Ninth Circuit's decision in *Bjaranson*. The Ninth Circuit did not address the active involvement duty since that duty was not at issue in *Bjaranson*. Petitioners claim that the Fifth Circuit erred in failing to discuss the active involvement duty. There can be no conflict between

these two decisions simply because neither opinion even addressed the duty that petitioners claim may have been breached in this case.

In the case at bar, there is no evidence that any member of the crew of the M/V TONY G retained and exercised active control over the back deck, nor that they were involved in the backloading operation. To the contrary, the evidence supports the fact that the crew was not involved in the backloading operation, and that Captain Darby only directed the placement of the first piece of equipment. Petitioners have conceded that the back deck of the M/V TONY G was turned over to the Halliburton crew. There is thus no evidence to support petitioners' claim that the active involvement duty was breached. The Ninth Circuit's decision in *Bjaranson* is inapplicable.

II. Petitioners' Misstatements

Respondent Phil Guilbeau Offshore, Inc. respectfully submits that the petitioners have made the following misstatements of law and fact within their *Petition for a Writ of Certiorari*.

A. Misstatements Of Law

Petitioners quote a portion of the Fifth Circuit's decision in the case at bar that reads, "for the ship owner to be liable under the second *Scindia* duty the vessel must exercise active control over the actual methods and operative details of the longshoreman's work. *Breaux v. United States*, 1996 WL 626328 at *4 (E.D. La. 1996)." *Petition for a Writ of Certiorari*, pp. 6-7. Petitioners then assert that "This is simply not the law and there is no federal appellate court case that has ever held such." *Petition for a Writ of Certiorari*, p. 7.

Respondent respectfully submits that this is a misstatement of law, in that the Fifth Circuit correctly stated the second *Scindia* duty, and that there are at least two decisions, one appellate and one Supreme Court, which support the holding in the *Breaux* case. *See Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994) (stating that to impose a duty upon vessels to exercise scrutiny over a cargo loading operation to discover defects that may become hidden when the stow is complete would require vessels to inject themselves into matters beyond their ordinary province); *Clay v. Daiichi Shipping*, 237 F.3d 631 (5th Cir. 2000) (affirming the district court's decision that the vessel's role in dictating where the cargo will be stowed does not in itself justify imposing liability on the vessel owner).

B. Misstatements Of Fact

Petitioners state that "Captain Darby was at the stern controls facing the deck maneuvering the TONY G in the rough seas and directing the placement of the equipment on his back deck." *Petition for a Writ of Certiorari*, p. 3-4. Petitioners further state, "Captain Darby was certainly actively involved in this operation in continuously controlling the motion of the vessel, while at the stern control controls, and in directing the placement of the equipment on the deck." *Petition for a Writ of Certiorari*, p. 7.

Respondent respectfully submits that this is a misstatement of fact. The record evidence establishes that Captain Darby only participated in the placement of the first and heaviest piece of equipment loaded, the skid unit with the wireline (*Ct. R. at 000097*). This was for stability purposes.

Additionally, the record evidence establishes that the three men who made up the Halliburton crew were the only individuals involved in the backloading operation. *Ct. R. at 000267*. The crew of the M/V TONY G was not involved in the backloading operation at all. *Ct. R. at 000267*. During the backloading operation, the Halliburton equipment was being hoisted by a crane located on the RAM XI, which was being operated by an Aries Marine Corporation employee, Larry Hebert. *Ct. R. at 000237-38*. Mr. Meehan was communicating with Mr. Hebert from his position on the back deck of the M/V TONY G, signaling the direction and lowering of the Halliburton equipment. *Ct. R. at 000305*. There is no evidence that Captain Darby did anything more than direct the placement of the first piece of equipment placed on the M/V TONY G's back deck, then hold the boat steady for the Halliburton crew to perform the backloading operation.

Petitioners state, "The Halliburton crew played no part in decisions as to where the equipment would be placed on the deck." *Petition for a Writ of Certiorari*, p. 4. This statement is belied by the record evidence. The Halliburton equipment was being hoisted by a crane located on the RAM XI, which was being operated by an Aries Marine Corporation employee, Larry Hebert (*Ct. R. at 000237-38*). Mr. Meehan of the Halliburton crew was communicating with Mr. Hebert from his position on the back deck of the M/V TONY G, signaling the direction and lowering of the Halliburton equipment (*Ct. R. at 000305*). It was Mr. Meehan of the Halliburton crew directing the placement of the Halliburton equipment on the M/V TONY G's back deck, except for the very first piece. No reasonable inference can be drawn from this undisputed evidence to prove active involvement by the vessel crew at the time of Mr. Pledger's accident.

CONCLUSION

The Fifth Circuit properly applied the law as set forth in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, and there is no conflict between the Fifth Circuit's decision in the case at bar and the Third and Ninth Circuits' decisions in the *Davis* and *Bjaranson* cases, respectively. The undisputed evidence establishes that the vessel crew was not actively involved in cargo operations at the time of Mr. Pledger's injury. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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